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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/314,566	05/19/1999	HEATHER ACHILLES	82771.P286	5400

7590 05/26/2005

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EXAMINER

MOORE JR, MICHAEL J

ART UNIT	PAPER NUMBER
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2666

DATE MAILED: 05/26/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/314,566

Applicant(s)

ACHILLES ET AL.

Examiner

Michael J. Moore, Jr.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 April 2005.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 4-6 and 16-18 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 4, 5, 16 and 17 is/are rejected.
- 7) ☒ Claim(s) 6 and 18 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 13 April 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Drawings

1. Replacement drawings were received on 4/13/2005. These drawings are acceptable and have been entered.

Claim Objections

2. Claims **4, 6, and 18** are objected to because of the following informalities:

Regarding claim **4**, on line 8, the word "the" before "recovered" should be deleted in order to have proper antecedent basis. Also on line 9, "n" after the word "based" should be "on".

Regarding claim **6**, on line 2, a semicolon should follow the word "packet".

Regarding claim **18**, this claim as amended currently has no dependency on another claim. It is believed by Examiner that this claim should depend on claim **16**.

Appropriate correction is required.

Double Patenting

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims **4 and 5** are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim **1** of U.S. Patent No. 6,647,424 (Pearson et al.) ("Pearson"). Although the conflicting claims are not identical, they are not patentably distinct from each other because of the following correspondences.

Regarding claim **5**, *"classifying the data packet including a type of service (TOS) indicator in order to produce an internal class service (ISC) indicator and a drop preference (DP) indicator"* corresponds to "classifying an internal service class (ISC) to the data packet according to...a type of service (TOS)/precedence field" as well as "setting a drop preference bit (DP) for the data packet" in claim **1** of Pearson.

"Modifying the data packet with a watermark (WM) indicator according to the availability of a system resource" corresponds to "setting a watermark indicator for the data packet responsive to a congestion level of a buffer memory" in claim **1** of Pearson. *"Concatenating the ISC indicator, the WM indicator, and the DP indicator of the data packet to produce a key value"* corresponds to "concatenating the ISC, DP, and WM into a key" in claim **1** of Pearson. *"Comparing the recovered data to a committed information rate (CIR)"* corresponds to "comparing the ISC to a committed information rate (CIR)" in claim **1** of Pearson.

Lastly, *"Discarding the data packet based on a result of a comparison of the recovered data and the CIR"* and *"finding an entry in a congestion clip table (CCT) using a key value being a concatenation of the ISC indicator, the WM indicator, and the DP indicator; and comparing data recovered from the entry to the CIR"* corresponds to "comparing the ISC to a committed information rate (CIR)" and "discarding the data

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packet responsive to the lookup into the configurable congestion clip table” in claim 1 of Pearson. The above correspondences show a mere change in wording that would be obvious to someone skilled in the art.

Claims 4 and 5 differ from claim 1 of Pearson for the following reasons. Claims 4 and 5 do not claim, “adding a size value of the data packet to a data count for the ISC”. Therefore, claims 4 and 5 merely broaden the scope of claim 1 of Pearson.

It has been held that the omission of an element and its function is an obvious expedient if the remaining elements perform the same function as before. See *In re Karlson*, 136 USPQ 184 (CCPA). Also note *Ex parte Rainu*, 168 USPQ 375 (Bd. App. 1969). The omission of a reference element whose function is not needed would be obvious to one skilled in the art.

5. Claims 16 and 17 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 15 of U.S. Patent No. 6,647,424 (Pearson et al.) (“Pearson”). Although the conflicting claims are not identical, they are not patentably distinct from each other because of similar reasoning as applied to claims 4 and 5 above.

Allowable Subject Matter

6. Claims 4-6 and 16-18 would be allowable upon Applicant overcoming the obviousness-type double patenting rejection provided above.

7. The following is a statement of reasons for the indication of allowable subject matter:

Regarding claim 4, the prior art of record fails to teach classifying a data packet with a TOS indicator in order to produce an internal service class indicator and a drop preference indicator, concatenating the ISC indicator, the WM indicator, and the DP indicator of the data packet to produce a key value, comparing recovered data to a committed information rate, and then discarding the data packet based on a result of the comparison.

Regarding claims 5 and 6, these claims are further limiting to claim 4 and are thus also allowable over the prior art of record.

Regarding claims 16-18, these claims are allowable over the prior art of record for similar reasons as claims 4-6 above.

Response to Arguments

8. Applicant's arguments with respect to amended claims 4 and 16 have been fully considered and are persuasive. The prior art rejections of amended claims 4-6 and 16-18 have been withdrawn.

Conclusion

9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not

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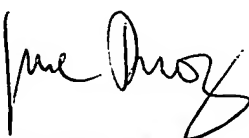
mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael J. Moore, Jr. whose telephone number is (571) 272-3168. The examiner can normally be reached on Monday-Friday (8:30am - 5:00pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Seema S. Rao can be reached at (571) 272-3174. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

mjm MM


FRANK DUONG
PRIMARY EXAMINER

Michael J. Moore, Jr.
Examiner
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